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No. 93-518

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In the Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OREGON

Brief for the State of Oregon as
Amicus Curiae Supporting Respondent

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QUESTION PRESENTED

Where a city has determined through extensive study that increasing the density of commercial development in a particular locale will aggravate an existing flood hazard and will place additional burdens on the city's transportation system, may the city by ordinance condition approval of development on the landowner's dedication of easements that will permit the city to improve the floodplain and enhance transportation for pedestrians and bicyclists?

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INTEREST OF THE STATE OF OREGON

This case concerns a challenge to the constitutionality of conditions placed on a commercial development permit by the City of Tigard, a political subdivision of the State of Oregon. The city approved petitioner's proposal to intensify the use of her business property on the conditions, *inter alia*, that (1) she dedicate an easement to the portion of the property that lies in a floodplain to permit improvement of the storm drainage system, and (2) she dedicate an easement across a 15-foot strip of land next to the floodplain, upon which the city would construct a pedestrian/bicycle pathway. Petitioner attacks the exactions as uncompensated "takings" under the Fifth Amendment of the federal constitution.

Two decades ago, Oregon embarked on a coordinated land use planning program that dramatically differs from what it or other States followed at that time.¹ In Oregon, comprehensive local and regional land use planning is a mandatory process actively overseen at the state level. A specially created state agency sets land use standards with which all state and local land use decisions must comply. Those standards address all aspects of land use, including housing, commercial and industrial development, transportation, public facilities, energy, natural resources and development of rural land. In addition, the standards stress involvement of all the citizens of the State in the planning process. Local and regional entities, such as cities and counties, are required to engage in comprehensive planning that culminates in the adoption of a written planning document. They must anticipate all local conditions that presently or will in the future bear on the statewide goals, such as the impacts of development or intensified uses on transportation, natural disasters and hazards, and public services. Moreover, that

¹ Oregon adopted this changed approach to land use planning with the passage of Senate Bill 100 in the 1973 legislative session. Under the traditional and more common model, most land use decisions are a product of zoning. Comprehensive planning is not a condition to the exercise of zoning power. Instead, the comprehensive planning process typically is limited to public facilities (e.g., public capital facilities, streets and open spaces) and there is no statewide coordination of local planning. See generally Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulations*, 74 MICH. L. REV. 901, 901-10 (1976). Oregon departed from this model, even before the changes the legislature made in 1973. If cities and counties wanted to exercise zoning authority, they were required to have comprehensive plans, and zoning regulations were subordinate to those plans. See generally *Fasano v. Board of County Commissioners of Washington County*, 264 Or. 574, 507 P.2d 23 (1973) (decided under pre-1973 statutes). Zoning became mandatory in 1969. 1969 Or. Laws ch. 324. But until the 1973 legislation, there was no statewide coordination or oversight of local planning, and no mechanism existed to ensure that local planning took place.

planning must be supported by extensive factual and expert documentation. When the plan is complete, it is reviewed and must be approved at the state level. From initial study through final approval, local citizens have significant opportunities, administratively and judicially, to be heard, to examine the factual bases for the planning choices, and to seek to have a plan rejected if it does not anticipate relevant land use impacts.

The State of Oregon has a direct interest in this case because petitioner's position fundamentally implicates the integrity and efficacy of Oregon's comprehensive statewide land use planning process. Petitioner's argument focuses on whether the city's development conditions have the required relationship to the expected impacts of her proposed land use. That question cannot be completely answered, however, by looking solely to petitioner's application for a land use change and the events that transpired in response to that application. Instead, whether the required relationship exists must be considered in the context of the statewide land use planning process that led in significant part to the action that the City of Tigard took on petitioner's application. The State of Oregon submits this amicus brief so that the Court will better understand the comprehensive land use planning program now in place in Oregon, complete with the procedural and substantive protections that program provides, all of which properly should bear on the Court's consideration of the legal issues this case raises.

STATEMENT

Amicus State of Oregon offers this brief in support of respondent City of Tigard. The State agrees with respondent City of Tigard's statement of the case, including its statement of facts. The posture of the case and the context in which it arises is elaborated upon below in the discussion of Oregon's general land

use planning process and the manner in which the City of Tigard's comprehensive plan complied with that process.

SUMMARY OF ARGUMENT

The City of Tigard's comprehensive plan and development code are the product of a process that began with collection of evidence about development within the city, including information on flooding along Fanno Creek and transportation needs in the area of petitioner's business. The plan and development code address transportation, flood control, and other public and private property needs identified early in the planning process. Specifically, the plan identifies the development of petitioner's and other property along Fanno Creek as exacerbating storm drainage problems and transportation concerns, and as properties that would benefit from improved storm drainage and transportation facilities. The plan also prescribes actions to be taken to protect property near the Fanno Creek floodplain from hazards, as well as to provide properties in the area, including petitioner's, with adequate public transportation and access. To assist in offsetting the impacts of development, the city chose to require dedications of land for flood control, transportation and greenway needs. Its plan and the ordinances implementing it therefore exact those dedications as a required part of development approval.

Petitioner's position is that the city, to avoid an unconstitutional taking, must measure the impacts of her proposed use with mathematical precision and then tailor the conditions narrowly to meet those impacts only. Implicit in her position is the claim that the city cannot impose conditions designed to meet the larger strain on public services that development in that area, individually and cumulatively, would cause. Contrary to her argument, the Court's "takings" jurisprudence neither requires a site specific quantitative measure of a proposed development's precise

impacts nor limits conditions, including exactions, to offset only the impacts caused by a specific use. Government constitutionally may impose conditions on new or changed development when the development, either individually or cumulatively, will burden a legitimate public interest as long as the condition advances that *same* interest. In this case, the extensive study and planning that were the predicate to the city's land use legislation provided the nexus between the impacts of the development and the conditions the city placed on it, a nexus that petitioner maintains is completely lacking.

Under these circumstances, if the condition can be avoided at all, the burden should fall on the developer to demonstrate that a particular site or proposed use is uniquely situated and that the required nexus is lacking, or that the exactions are wholly disproportionate to the development's impacts. Petitioner attempted to avoid the required easement dedications by seeking a variance from the city's ordinance. In that proceeding, however, she declined to come forward with any claim or evidence that her development would not contribute to the impacts for which the city had comprehensively planned. Absent any challenge to the city's findings or its reliance on its prior planning, petitioner's constitutional attack must fail.

ARGUMENT

In 1973, the Oregon Legislature declared that the uncoordinated use of lands within the State threatened orderly development, the environment and "the health, safety, order, convenience, prosperity and welfare of the people of the state." Or. Rev. Stat. § 197.005(1). With that declaration, Oregon embarked on an ambitious process of land use planning and management, one that involves legislatively mandated planning for all land use impacts and provides comprehensive, statewide objectives to be

served by that planning. The planning process that Oregon mandates has required a massive and unprecedented investment of resources and effort on the part of government, business, citizens and interest groups alike. Thus, although Oregon's model has been in place for two decades, it has only recently begun to reach maturity. Nearly 13 years were required for Oregon to arrive at the point where approved comprehensive plans were in place for every region and locality in the State.² With the blueprint drawn and the foundation laid, however, Oregon has positioned itself to move into the Twenty-first Century prepared for the challenges of increased growth, population density, and economic shifts that the future without question holds.

An understanding of Oregon's land use planning process is necessary to provide the context for the legal issues the Court will resolve in this case. As the description below reveals, Oregon's comprehensive land use program itself provides the nexus that the Takings Clause requires when, as here, land use changes are conditioned on certain exactions. But an understanding of Oregon's system is important for a second reason. Petitioner essentially seeks a holding from the Court that would force planning entities, like Oregon cities and counties, to duplicate the study, effort and expense of their planning efforts on a site by site basis whenever a comprehensive plan and implementing regulations require exactions as a condition of

² Because of the complexity of the undertaking, completion of the planning throughout the State took much longer than sponsors of the 1973 legislation envisioned. See Hayes, *Approvals Put Final Touches on State Land-Use Plan*, *The Oregonian*, Aug. 8, 1986 (statements of Sen. Hallock). The achievement was one Oregon marked with pride. As the former director of DLCD commented: "I don't think there is any other state in the nation that can boast that every square inch of their cities and counties is all planned and zoned in a coordinated way." *Id.* (quote from James F. Ross).

proposed new development or uses. Beyond the obvious frustration and wastefulness of that result, Oregon also would be left with a program of comprehensive planning accompanied by at best uneven and uncertain implementation. Oregon submits that nothing in the constitution mandates that interference with state land use planning and management efforts.

I. AN OVERVIEW OF OREGON'S STATEWIDE LAND USE PLANNING PROCESS.

"Traditionally, American planning enabling legislation has not contained substantive planning policies, has rarely prescribed the contents of the plan, and has seldom indicated the goals that the plan should achieve."³ In Oregon, however, none of those traditional observations is true. Nor is it true in Oregon that land use is an exclusively local concern.⁴ Instead, Oregon land use planning is truly comprehensive and is coordinated on a statewide basis.

A. The Requirement of Mandatory Comprehensive Planning.

When the Oregon Legislature set the State's new course in 1973, it created the Land Conservation and Development Commission (LCDC) and the Department of Land Conservation

³ Mandelker, *supra*, at 951.

⁴ See Reiser, *Managing the Cumulative Effects of Coastal Land Development: Can Maine Law Meet the Challenge?*, 39 ME. L. REV. 321 (1987) (discussion of the challenge of managing the cumulative impacts of development, which increasingly cross municipal and other local government boundaries, given that land use control traditionally has been considered a matter of local concern).

and Development (DLCD),⁵ which together are charged with the responsibility to identify and adopt goals and guidelines to control land use planning activities in Oregon. Or. Rev. Stat. §§ 197.225, 197.240.⁶ The agencies promulgated a total of 19 goals, complete with definitions and implementing guidelines, which serve as the standards governing all land use planning in Oregon. Or. Admin. R. 660-15-000 *et seq.*

By statute, each city and county in Oregon must adopt a "comprehensive plan" and implementing regulations (*e.g.*, ordinances) in compliance with the goals adopted by the commission. Or. Rev. Stat. § 197.175. Oregon law defines the "comprehensive plan" as:

a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of land, including, but not limited to, sewer and water systems, transportation facilities, and natural resources and air and water quality management programs.

Or. Rev. Stat. § 197.015(5). In turn, "comprehensive" means "all-inclusive, both in terms of geographic area covered and functional and natural activities and systems occurring in the area covered by the plan." *Id.* A land use plan is "coordinated" when

⁵ The Department of Land Conservation and Development (DLCD) includes the Land Conservation and Development Commission (LCDC). Or. Rev. Stat. § 197.075. The *commission* is the policy making body responsible for adoption and promulgation of the Statewide Land Use Planning Goals, and the *department* serves as the commission's administrative arm. See Or. Rev. Stat. §§ 197.030 to 197.065 and 197.075 to 197.095.

⁶ Citations to Oregon statutes (Or. Rev. Stat.) and administrative rules (Or. Admin. R.) are to those in effect on the date the city's comprehensive land use plan and ordinances were found by LCDC to be in compliance with the statewide goals (Sept. 24, 1985).

"the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible." *Id.*

Once the comprehensive plan declares the governing land use policies for the jurisdiction, those policies must be implemented through one or more land use regulations. Oregon law defines "land use regulation" to encompass:

any local government zoning ordinance, land division ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan.

Or. Rev. Stat. § 197.015(11). Together, the comprehensive plan and the implementing land use regulations provide both the overall policy statement and the specific regulations necessary to control uses of land within the planning jurisdiction.

B. The Statewide Goals For Comprehensive Planning.

In complying with the legislative mandate to adopt a comprehensive plan and implementing ordinances, state and local planning entities are required to address each of the applicable 19 Statewide Land Use Planning Goals. Particularly relevant to this controversy are goals addressing citizen involvement in the planning process, the planning process itself, natural disasters and hazards, the State's economy, public facilities and services, and transportation. The State therefore offers a brief review of those goals.⁷

⁷ Goals addressing estuarine resources, coastal shorelands and beaches and dunes (Goals 16-18) were not applicable to the city's planning efforts.

1. *Goals 1 and 2 – Citizen Involvement, Factual Support and Data*

Goals 1 and 2 are principally concerned with the planning process and structure. Together, they superimpose on all land planning activities (including all phases of those activities) various procedural mechanisms that are designed to ensure quality in the decision-making. The two requirements of the goals most relevant to this case are those guaranteeing citizen involvement in the planning process and insisting on a full "inventory" of planning needs and factual data relevant to those needs.

The "Citizen Involvement" goal, Goal 1, exists:

[t]o develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

Or. Admin. R. 660-15-000(1). It requires the local government to adopt and to publicize a program for citizen involvement that "clearly defines the procedures by which the general public will be involved in the on-going land-use planning process." *Id.* The program must be adequately funded, involve a cross-section of affected citizens, assure effective two-way communication with citizens, provide opportunities for citizens to be involved in all phases of the planning process, assure that technical information is available in an understandable form, and assure that citizens will receive a response from policy makers. *Id.* The goal serves to guarantee that planning jurisdictions will meaningfully include citizens (and businesses) in the planning process, rather than surprise them with a plan and ordinances that have been developed privately by government staff.

The "Land Use Planning Goal," Goal 2, exists:

[t]o establish a land use planning process and policy framework as a basis for all decisions and actions related

to use of land and to assure an adequate factual base for such decisions and actions.

Or. Admin. R. 660-15-000(2). The goal is particularly relevant to this case because under it, land use plans must expressly consider the character of all land in the planning jurisdiction, the specific statewide goals that are implicated by the character of the land, and certain factual information that bears on each statewide goal. Specifically, Goal 2 requires the planning entity to include:

identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs.

Id. The goal requires that this factual information be contained in the plan document or in supporting documents. Both the plan and the supporting documents must be easily accessible to the public, thus reinforcing the citizen involvement provisions of Goal 1. *Id.*

2. *Goal 7 – Natural Disasters and Hazards*

Goal 7, "Areas Subject to Natural Disasters and Hazards," is a substantive goal that serves to minimize the aggravating effects of land use decisions on destructive natural hazards. Specifically, the goal seeks "[t]o protect life and property from natural disasters and hazards." Or. Admin. R. 660-15-000(7). All comprehensive plans therefore must include "an inventory of known areas of natural disaster and hazards." *Id.* The goal defines those areas to include "stream or ocean flooding, ground water erosion and deposition, land slides, earthquakes, weak foundation soils and other hazards unique to local or regional areas." *Id.* The goal achieves its protective end by prohibiting new uses or developments that would be subject to damage or that could result in loss of life in known areas of natural disasters

and hazards unless the planning entity provides "appropriate safeguards." *Id.*

3. Goal 9 – Enhancing the Economy

Entitled "Economy of The State," Goal 9 mandates that plans must contribute to a stable and healthy economy and must be based

on inventories of areas suitable for increased economic growth and activity after taking into consideration the health of the current economic base; materials and energy availability; labor market factors; transportation; current market forces; availability of renewable and non-renewable resources; availability of land; and pollution control requirements.

Or. Admin. R. 660-15-000(9). Significantly for this case, a jurisdiction cannot simply promote economic growth without regard to the services needed to support that growth. Under Goal 9, the planning entity is specifically obliged to consider transportation and other resources as part of its economic planning. *Id.*

4. Goal 11 – Public Facilities and Services

Goal 11, "Public Facilities and Services," directs the planning jurisdiction:

[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

Or. Admin. R. 660-15-000(11). To ensure that development does not outpace services necessary to support it, the goal mandates:

Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to the needs and requirements of the urban, urbanizable and rural areas to be served. A provision for key facilities shall be included in each plan. To meet current and long-range needs, a provision for solid waste disposal sites,

including sites for inert waste, shall be included in each plan.

Id. Thus, the goal's express demand that land use plans anticipate facilities and services "appropriate for, but limited to" the needs and requirements of urban and rural development inherently imposes on the planning process a requirement that development not expand unless the services necessary to support it are in place and are in keeping with the scale of the development.

5. Goal 12 – Transportation

Goal 12, "Transportation" is "[t]o provide and encourage a safe, convenient and economic transportation system." Or. Admin. R. 660-15-000(12). The goal directs that the transportation provisions of a comprehensive plan shall:

(1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services so as to strengthen the local and regional economy; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

Id.

C. The Acknowledgment Process.

Once the planning jurisdiction completes its inventory of uses, hazards, resources and other relevant data, has analyzed the information, and has drafted a comprehensive plan and imple-

menting regulations, it must receive LCDC's statement that the planning efforts comply with the goals. The LCDC action providing this approval is the "acknowledgment" order. Or. Rev. Stat. § 197.015(1) defines "acknowledgment" as:

a commission order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals.

LCDC acknowledgment review of local plans and regulations is controlled by Or. Rev. Stat. § 197.251. LCDC's review includes an opportunity for persons to prepare and submit written comments and objections to the pending request. Or. Rev. Stat. § 197.251(2)(a).⁸ DLCD's director then conducts an investigation to resolve issues raised in the objections or by the director's independent review of the plan, and the director issues a report to the commission that provides the director's views as to whether the comprehensive plan and land use regulations are in compliance with the statewide goals. Or. Rev. Stat. § 197.251(2)(b). The sequence then provides an opportunity for the local government and persons who previously filed written comments or objections to the plan to file with LCDC written exceptions to the director's report. Or. Rev. Stat. § 197.251(3). LCDC considers the acknowledgment request on the basis of "the record of proceedings before the local government" together with all comments and exceptions to the request. Or. Rev. Stat. § 197.251(4). At the end of the process, LCDC issues an order

⁸ Specifically, the statute requires that commission rules must provide "a reasonable opportunity for persons to prepare and to submit to the director written comments and objections to the acknowledgment request."

Or. Admin. R. 660-03-015 and 660-03-020 implement the statute. Or. Admin. R. 660-03-015 requires notice of the procedures and time limits for making comments or objections, as well as a list of the locations where relevant documents may be inspected by the general public.

granting, denying or continuing the acknowledgment request. In all cases, LCDC must make explicit findings explaining its decision. Or. Rev. Stat. § 197.251(5).⁹

"Acknowledgment" gives the comprehensive plan a position of primacy in the land use process. Until acknowledgment, every land use decision¹⁰ made by a city or county must independently comply with every one of LCDC's statewide land use planning goals. After acknowledgment, however, the provisions of the plan (and implementing ordinances) effectively replace the statewide goals. As long as a particular decision is in compliance with a city's plan and regulations, the city's land use decision cannot be challenged under the goals and the city cannot be forced to defend the decision independently against each of the 19 standards.¹¹

⁹ LCDC also may grant acknowledgment for a specific geographical area. Or. Rev. Stat. § 197.251(6). That action effectively results in an incremental acknowledgment process, in which the commission grants acknowledgment bit by bit until the whole of the planning agency's effort is found to be in compliance with the goals.

LCDC also is authorized to continue the acknowledgment request. To do so, it issues a continuance order in which it must specify amendments or other actions that must be taken within a specified time for acknowledgment to occur. Or. Rev. Stat. § 197.251(12). LCDC may also grant a planning extension to a local government. The extension allows more time in which the local government may bring its plan and implementing regulations into compliance with the goals. Or. Rev. Stat. § 197.251(11).

¹⁰ As applied to a local government, "land use decision" is any final decision or determination that concerns adoption, amendment or application of the goals, a comprehensive plan provision, a land use regulation, or a new land use regulation. Or. Rev. Stat. § 197.015(10). It includes such matters as subdivision approvals (the application of a land use regulation) and other land development decisions.

¹¹ Or. Rev. Stat. § 197.175(2); *Byrd v. Stringer*, 295 Or. 311, 318-19, 666 P.2d 1332 (1983).

D. Judicial Review and Subsequent Revision.

Citizens, businesses and other interested parties in disagreement with LCDC's action may seek relief through judicial review under the Oregon Administrative Procedure Act, Or. Rev. Stat. §§ 183.310 to 183.550.¹² The order therefore may be appealed to the Oregon Court of Appeals. The Court of Appeals' decision, in turn, is subject to discretionary review by the Oregon Supreme Court.¹³

The plan and its implementing measures are not frozen, but must be responsive to changes. Both Goal 2 and the statutory scheme¹⁴ recognize that new factual information and changing needs will require revision to comprehensive plans and their implementing measures. Goal 2 therefore provides that plans and implementing measures must be reviewed and revised on a periodic basis "to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan." Or. Admin. R. 660-15-000(2). The law further provides for "Post Acknowledgment" procedures in which changes to the plan

¹² Since 1983, LCDC orders are reviewable pursuant to the same procedures and standards that govern review in administrative "contested case" proceedings. 1983 Or. Laws Ch. 827 § 52. The relevant statute provides for judicial inquiry into the procedures used to issue a final order, whether the agency erroneously interpreted a provision of law, whether the agency acted outside the range of discretion delegated by law, whether the agency acted inconsistently with an officially stated agency position or prior practice (if the inconsistency is not explained), whether the agency acted in violation of a constitutional or statutory provision and whether the agency's order is not supported by substantial evidence in the record. Or. Rev. Stat. § 183.482.

¹³ Or. Rev. Stat. § 183.482 (appeal to Court of Appeals) and § 2.520 (Supreme Court review). The right to judicial review includes a right to review of a limited acknowledgment order. Or. Rev. Stat. §§ 197.251(9) and (10).

¹⁴ See Or. Rev. Stat. §§ 197.610 to 197.650.

are reviewed by LCDC to ensure continuing compliance with the goals. Judicial review is also available for post-acknowledgment orders. Or. Rev. Stat. § 197.650.

Finally, it is important to note that the availability of judicial review extends beyond the acknowledgment and post-acknowledgment process. Judicial appeals are available not only to challenge enactment of local land use comprehensive plans (together with implementing ordinances) and amendments to them, but also to test individual land use decisions taken under the plan and regulations. As to the latter, the initial jurisdiction for review of the land use decisions rests with the Land Use Board of Appeals (LUBA), a quasi-judicial administrative tribunal.¹⁵ LUBA decisions in those cases are subject to judicial review. Or. Rev. Stat. §§ 197.805 to 197.860 controls both LUBA's review authority and judicial review of LUBA final orders.¹⁶

E. The Planning Process As Reflected In the City's Comprehensive Plan.

1. Compliance with statewide goals.

In compliance with the statewide standards set in the goals, the City of Tigard's comprehensive plan includes a discussion of

¹⁵ Enforcing compliance with statewide standards is not dependent on the willingness of private parties to seek review in administrative or judicial forums. The State has independent authority to initiate proceedings that will ensure that plans and local land use decisions comply with the goals. Under Or. Rev. Stat. § 197.320, the agency may issue an order requiring a local government or other governmental body to take action necessary to bring its plan, regulations or other land use decisions into compliance with the goals.

¹⁶ As the record in this case demonstrates, petitioner appealed the city's imposition of the exaction requirement to LUBA. LUBA's final opinion and order gave rise to the appeal in this case. In its review, LUBA tested the city's decision against the city's ordinances and statutory law, not against the goals.

its planning process and its citizen involvement program. Comp. Plan I, 1-15.¹⁷ It also includes identification of flood and other hazards within its jurisdiction and a discussion of approaches used to cope with the problems associated with the identified hazards. *Id.*, at 20-24. Relevant to this case, the plan discusses the hydrology of the Fanno Creek area and it specifically includes a description of the history of damage caused by flooding in years past. *Id.*, at 54 *et seq.* Volume I of the city's plan also includes a bibliography of studies and other documents used to support the plan's discussion of facts about the city's environment and needs.¹⁸

In Volume II, the plan articulates the specific policies designed to address the city's various "Natural Features & Open Space," including flooding. The plan relies on detailed floodplain information from the U.S. Army Corps of Engineers and sets forth directives designed to control flooding in the Fanno Creek area. Plan policies include a prohibition on development or land form alterations in the floodway, except for those which preserve or enhance the maintenance of the "zero-foot rise floodway." *Id.* Where development is allowed in the 100-year floodplain outside of the zero-foot rise floodway, the city requires: (1) maintenance of the stream flow capacity of the zero-foot rise floodway; (2)

¹⁷ The city's acknowledged comprehensive plan was a part of the record during the LUBA proceedings. LUBA did not transmit the city's plan to the appellate courts. The plan is, however, a public document and an official part of the record in this case. If it is needed for this Court's review, the Oregon appellate courts undoubtedly would obtain and transmit it.

¹⁸ The city's plan includes basic facts about the city, including its resources, hazards, services and other relevant information. It also includes a list of the sources used to gather these facts. *See* Comp. Plan, Vol. I, Resource Document, I-109-112; I-133. *See also* Master Drainage Plan 464G1-2.

documentation showing that there will be no detrimental upstream or downstream effects in the floodplain area; and (3) a buffer on commercial or industrial land abutting residential land that adequately screens the development from view by adjoining residential land and also provides a sound buffer. In addition, for development of property within the floodplain, the city requires:

The dedication of open land area for greenway adjoining the floodplain including portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian bicycle pathway plan.

Id., at 15.¹⁹ In effect, the plan requires denial of any development or land alteration that fails to advance the goal of reducing the recognized threat of flooding.

Significantly, the plan also states that flood levels in the city "will be substantially determined by the controls exercised over development outside the plan area, as well as inside Tigard's Planning Area." *Id.*, at 13. The city's plan therefore recognizes that flooding is affected by all activities along the floodway. Indeed, the plan states:

The Fanno Creek drainage system includes numerous small water courses. The integrity of these natural drainageways is intrinsically connected to the system's capacity to absorb excessive runoff and on subsequent flood levels. Often, however, water courses are altered to provide more useable land. If alterations are done incorrectly, impacts can be adverse. If the impacts are adverse, they can be detrimental to the entire drainage system, i.e., the storage capacity of the water course is lessened and flooding occurs. In fact, in lower reaches,

¹⁹ Since 1983, Or. Rev. Stat. § 227.175(4) specifically has allowed cities to impose "such conditions as are authorized by * * * city legislation" in granting development permits. 1983 Or. Laws ch. 827, § 24.

it is beneficial to have more water move through at a faster rate.

*Id.*²⁰

The plan makes it incumbent on the applicant for development to provide the city with necessary information for making sound decisions. The applicant has the burden to show that a project will "not adversely affect the environment" or create undue future liabilities for the city. *Id.*, at 14.

The city's development code further implements these provisions, including the dedication requirement. The Tigard Community Development Code (CDC) addresses development adjacent to the 100-year floodplain. CDC § 18.120.180.A.8; *see also* § 18.84.040. It mandates dedication of sufficient open land area for greenway adjoining and within the floodplain. In addition, it requires that the dedication include area for construction of a pedestrian and bicycle pathway. *Id.*²¹

2. The legal and factual bases for the conditions placed on petitioner's development.

When petitioner approached the City of Tigard seeking approval to intensify the use of her property through an expansion of her business, the planning commission applied the comprehensive plan and development code to petitioner's request. The city planning commission's final order fully articulates the legal and factual basis for its decision to require the dedication of the easements on a portion of petitioner's property.

²⁰ The plan specifically observes that the 1981 "Drainage Master Plan Study" prepared by the engineering firm of CH2M Hill, Inc. found that flood levels of two to four feet higher than the existing 100-year floodplain may be expected if no corrective measures are taken. *Id.*

²¹ The city's brief contains additional discussion of the provisions of the plan and ordinance relating to the dedications. *See* Resp. Br. 6-12.

With respect to the dedication of the floodplain easement, the city's final order explained that the increased impervious surface accompanying the proposed development would be expected to increase the amount of storm water runoff from the site into Fanno Creek.

The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site.

Pet. Cert., App. G-37.

The order further explained that modifications to the Fanno Creek channel were needed in order to improve its flow efficiency. The dedicated portion of petitioner's land serves to permit the city's construction of improvements necessary to control drainage. With the dedication, the channel improvements are possible; without it, they are not. As the order states, the improvements:

would be expected to improve the channel's ability to transmit stormwater flows thereby reducing the 100 year flood elevation and reducing the possibility of floodwater damages and threats to public safety.

Pet. Cert., App. G-40. The city found that if the dedication were not required,

the existing storm water drainage system would be affected because additional storm water runoff resulting from additional development both from the subject site

and elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek and [cause] a rise in the 100 year flood elevation without the public's ability to make channel modifications in this area to offset the increase in stream flow.

Pet. Cert., App. G-40.

With respect to the bicycle and pedestrian paths, the planning commission's order explained that a continuous pathway is imperative if the paths are to function as an efficient, convenient and safe transportation system. Pet. Cert., App. G-26. To omit a section of the pathway would conflict with the city's adopted policy of providing a continuous pathway system to serve the public needs as the use of the downtown business district intensifies. *Id.* The city determined that petitioner's expanded business would add to existing traffic problems and that the pathway would help alleviate that burden. Petitioner's expanded business was expected to generate an additional 400-plus trips per week. Pet. Cert., App. G-15. The city found that this additional vehicular traffic would

increas[e] congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

Pet. Cert., App. G-24.

Moreover, the city found that petitioner's property likely would benefit from the pathway:

It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs.

Id.

In sum, the city's comprehensive plan revealed a flood and drainage hazard and a need for bicycle/pedestrian pathways. The city's land use regulations addressed those needs and required the exactions as a means to enhance both flood control and local transportation. The petitioner's property is among those that were identified during the planning process both as giving a rise to the need for flood control and transportation-related easements, and as benefitting from the city's enhanced management of those public services. In addition, the commission's order includes its own discussion of the flood hazard created by Fanno Creek and need for improved transportation in the downtown business district. Finally, the order identifies petitioner's proposed intensified use of her property as aggravating those needs.

II. THE SIGNIFICANCE OF OREGON'S LAND USE PLANNING TO THE LEGAL ISSUES IN THIS CASE.

Amicus State of Oregon agrees with the basic legal analysis set out in the Oregon Supreme Court's opinion below and with the arguments advanced by the city in its brief on the merits. This brief does not duplicate those points, but instead supplements them with some additional observations about how Oregon's comprehensive planning process bears on the issues the Court must resolve.

Petitioner's application to expand her business development triggered the provisions of the city's comprehensive plan and ordinances that are addressed to intensified uses within the downtown business area bordering Fanno Creek. The hearings and orders that followed represent the implementation of an extensive land use planning effort, not an isolated or *ad hoc* land use decision. Petitioner's arguments nevertheless focus narrowly on the city's decision to condition her permit to intensify the development of her property, as though no study or planning

preceded it. Her claim is that the city's conditions are inadequately justified because the city did not impose them on the basis of a parcel-specific study of the precise impacts that her development would have on storm drainage, transportation and the other public needs served by the conditions. She then attacks the conditions as extortion or a subterfuge, claiming that because the city's code already required the conditions to be imposed, the decision to impose them was foregone and unrelated to any actual effects of the proposed development.

The State agrees with the city's central thesis that nothing in the Court's Takings Clause jurisprudence requires a *quid pro quo* between government and a property owner such that the conditions placed on development must be an exact, quantitative measure of the precise burdens the development will impose on legitimate public interests. See generally Resp. Br. 23-30. Rather, the appropriate inquiry is whether the development, alone or by reason of the cumulative impact produced in conjunction with other construction, would substantially impede a legitimate public interest, and whether the condition placed on the development serves to advance that *same* interest. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-37 (1987). The significance of Oregon's land use planning process is that it provides the predicate nexus between the conditions placed on a development and the legitimate interests the conditions serve.

The entire land use planning program in place in Oregon is directed to a process that, by design, identifies the statewide public interests that all land use regulation should further. That effort leads to a set of planning goals that define Oregon's interests and then become the standards to which all land use plans and implementing regulations are held. Even in the abstract, flood control and protection from other hazards,

transportation and the delivery of public services would seem to be among the most obviously and intuitively legitimate interests a land use plan or decision could seek to serve. When those needs are identified and articulated through a formalized set of statewide land use planning goals, as they are in Oregon, their legitimacy cannot be doubted. Petitioner, not surprisingly, has never denied or challenged the legitimacy of flood control on Fanno Creek or the importance of the State's transportation goals.

The comprehensive planning process itself establishes a nexus in fact between the public's legitimate interests and the conditions placed on the development of petitioner's property. Before a comprehensive plan can become effective, it must be "acknowledged" and thereby reviewed and approved by an agency of statewide review authority. The acknowledgment process provides a significant measure of assurance that the comprehensive plan has adequately inventoried all property in the jurisdiction, that the plan accounts for the impacts of the present and future uses of the properties, and that the jurisdiction's plan is appropriately tailored to those impacts to the extent they implicate the statewide goals. The acknowledgment review additionally permits a full examination of the factual basis for the planning, and invites all interested citizens and businesses to be heard on the adequacy of the factual support for the plan and its proposed implementing regulations. In whatever terms the required nexus is described,²² the comprehensive plan and acknowledgment

²² The State agrees with the city that petitioner's quarrel with the "standard" that the Oregon Supreme Court announced invokes linguistic formalism over meaningful analysis. See Resp. Br. 26 and n. 20. The test should be practical and should focus on a nexus in fact — that is, a causal connection that is actual.

process is sufficient to demonstrate, at least as a threshold proposition, the critical nexus between the impacts of a particular development and the conditions placed on that development.

In this case, therefore, the city should be entitled to rely on its comprehensive plan and ordinances as the basis to sustain the conditions, as long as petitioner's property and its proposed use are among those that the plan and ordinances identify as giving rise to transportation and storm drainage concerns. The city's plan and code set land use policies that are acknowledged to be in compliance with the statewide goals. The city's order explains why it is appropriate to apply the comprehensive plan and code provisions to petitioner's property. Specifically, the order explains that intensifying the use of petitioner's property will impede the city's efforts to provide adequate storm drainage and transportation facilities. It also explains that the dedication of a portion of petitioner's land (in the form of an easement) will advance those interests by enabling the city to make needed improvements to the storm drainage channel and to complete and maintain a bicycle/pedestrian pathway, which in turn will help alleviate traffic congestion in the downtown business district where petitioner's property is located. No more should be required of the city.

It may be an open question whether, and under what circumstances, a property owner is entitled to avoid exactions that have been imposed pursuant to extensive planning and study, as the city's have in this case.²³ This case, however, does not present

²³ For example, subdivision exactions, such as the construction of sidewalks or street improvements, easily meet even the most stringent requirement of a nexus between the development and the conditions placed on it. A city should be entitled to impose those conditions, even in the face of proof from a developer that the particular occupants of a subdivision will

(continued...)

that question. Assuming that there are such circumstances, the burden should be on the property owner to refute what the comprehensive plan otherwise establishes. Before petitioner could successfully claim that the city is unconstitutionally depriving her of a property interest, at a minimum she would have to demonstrate that the city's comprehensive plan wrongly includes her property within the class of properties that it has determined will burden its storm drainage and transportation networks if development on the property is intensified. The question is not presented here because petitioner had a full opportunity in this case to make that showing, but she declined it.

The opportunity was first available in the course of the comprehensive planning and acknowledgment process. Petitioner was fully entitled to challenge the city's plan and ordinance on the basis that development of her property did not implicate the city's transportation or storm drainage interests. She could have raised those claims first by presenting them to the city; she then could have submitted them to DLCD in the acknowledgment process; finally, she could have sought judicial review of the plan and challenged it on that basis.²⁴

²³ (...continued)

not require sidewalks or street improvements. The purpose of such exactions, and the need for them, is not limited to a particular property owner's uses, but instead extends to the needs of the public who also will access the property, and the demands of future uses for which the property is suited.

²⁴ Petitioner owned and operated the plumbing business for many years prior to implementation of the 1973 comprehensive planning process in Oregon. Her interests and that of her business were entitled to full participation in the city's planning effort. Even if petitioner had not owned the business at that time, however, that opportunity would have been available to her predecessor in interest.

More important, in this case, the variance procedure petitioner invoked below would have permitted petitioner an effective opportunity to challenge the application of the plan and ordinances to her property. Had petitioner attempted to address the applicable variance criteria, she might have been able to convince the city that her property was uniquely situated and that her development proposal would not adversely affect drainage and other concerns reflected in the city code provisions requiring the dedication.²⁵ Not only did petitioner fail to establish that her property was uniquely situated from the others that the city had studied, she never even raised that claim. Her position below was that there was no set of circumstances under which the conditions could be constitutionally imposed. She asserted simply that she was entitled to a variance because to impose the conditions without compensating her would result in an unconstitutional taking of her property. As far as petitioner was concerned, the basis for the city's comprehensive plan and implementing regulations was wholly irrelevant.

Nothing in the Fifth Amendment Takings Clause requires such an irrational and wasteful result. Oregon has adopted a land use program that is a model of progressive planning.²⁶ That

²⁵ Under the city's variance provisions, a variance may be allowed upon a showing that it will not be materially detrimental to the plan or to any applicable standards; that there are special circumstances peculiar to the property not common to other properties in the same zone; that the use proposed will be the same as permitted under the code and that city standards will be maintained to the greatest extent possible while permitting some economic use of the land; that physical and natural systems such as traffic and drainage will not be adversely affected; and that the hardship is not self-imposed. See CDC § 18.134.050.

²⁶ Oregon has gained national recognition as a frontrunner in land use planning and growth management. Its program has been extensively studied (continued...)

program builds in significant safeguards for the interests of affected citizens and businesses. The safeguards it offers are both substantive (statewide goals that must be complied with; plan provisions must be tailored to those goals) and procedural (citizen participation; factual basis for decision; opportunity for administrative and judicial challenge). Petitioner's argument effectively would treat the comprehensive plan and acknowledgment process as a nullity. It would require parcel-by-parcel reexamination of the impacts of development every time a city proposed to apply its plan and implementing regulations to a new or expanded use. That result would reduce land use controls in Oregon to a piecemeal rather than a comprehensive program and thereby frustrate planning efforts by rendering them less effective and prohibitively expensive. There is a serious question whether Oregon or any other State would continue or adopt comprehensive planning programs when those programs cannot be implemented on a comprehensive basis. *Amicus* State of Oregon

²⁶ (...continued)

by experts and commentators in the land use field, and many other States have begun to implement features similar to Oregon's. The articles and texts discussing Oregon's leadership in the area are too numerous for citation. As representative examples, however, consult G. KNAPP & A. NELSON, *THE REGULATED LANDSCAPE* 1 (1992) ("[Oregon] is nationally recognized as a leader in land use controls and offers a unique laboratory for examining the effects of statewide land use planning"); Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENVTL. L. REP. 10367, 10368 (1992) ("Since 1985, a growing number of states have either adopted new statewide land use planning programs or fundamentally revised existing programs. * * * [Oregon] continues to provide lessons for states that implemented growth management programs in the 1980's"); Howe, *Growth Management in Oregon*, in *GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990's* 61 (1993) ("Oregon is a nationally recognized pioneer in the development of growth management techniques").

respectfully submits that no principle embodied in the Takings Clause compels the result petitioner seeks.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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February 14, 1994